Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO T-02-106 OF 1994
GOPAL SRI RAM, SITI NORMA YAAKOB AND VC GEORGE JJCA
13, 20, 30 DECEMBER 1994

Civil Procedure *— Injunction — Interlocutory injunction — Grounds to consider — Application to set aside — Judge dissolved injunction — Whether should reapply for injunction or appeal against judge's decision — Rules of the High Court 1980 O 29 r 1(2B)*

Civil Procedure *— Locus standi — Plaintiff applied for interlocutory injunction — Second and third defendants not parties to original agreement — Whether plaintiff could take action against them — Whether second and third defendants puppets controlled by first defendant — Serious question to be tried and to be resolved at trial — Specific Relief Act 1950 s 26(b)*

Contract *— Illegality — Interlocutory proceedings — Serious question requiring mature consideration at trial*

Contract *— Injunction — Balance of convenience — Whether judge took into account all relevant considerations*

Contract *— Injunction — Whether damages adequate remedy — Agreement provided that in the event of termination of agreement agreed compensation to be paid — Whether contract may still be enforced — Specific Relief Act 1950 s 19*

The state government of Terengganu offered Kilang Perkayuan Hj Mohd Noor ('the firm') a licence to enter upon and harvest timber from two parcels of a concession demarcated as compartments 408 and 412. The offer was accepted. Before any licence was issued, the firm entered into an agreement ('the agreement') with the plaintiff where it sold to the plaintiff all the timber located on the two parcels. The state authority later issued the licence in respect of compartment 412 of which no dispute arises. When the plaintiff came to harvest timber from compartment 408, he discovered that that parcel had been subjected to logging by neighbouring loggers and had been left in a state which did not accord with the terms or the description accorded it in the original grant in the licence. An arrangement was then arrived at whereby the firm was to apply for a replacement parcel. This was done and the state issued a new licence to the firm for a new parcel designated as compartment 549.

The first defendant, the sole proprietor of the firm, then went bankrupt and the second and third defendants were brought in as partners, whereupon the first defendant then withdrew from the firm. Once the new licence for compartment 549 was issued, the firm proceeded to act as if the agreement did not exist. The plaintiff took

out a writ against the defendants and obtained an ex parte injunction preventing them from entering compartment 549 or giving effect to any agreements, apart from the agreement with the plaintiff to sell him the timber logs harvested from the said parcel. On an application to set aside that injunction, the judge dissolved the injunction because:

(1) the parties did not contemplate that compartment 549 would form part of their agreement and, therefore, the plaintiff could claim no rights in respect of it;

(2) the plaintiff had no locus standi to sue the second and third defendants because they were not parties to the agreement;

(3) the agreement was illegal and consequently, there was no serious question to be tried;

(4) the balance of convenience lay in favour of the defendants; and

(5) damages were an adequate remedy, the parties having provided for it in cl 14 of the agreement.

The plaintiff appealed to the Court of Appeal.

Held, allowing the appeal:

(1) (Per **Gopal Sri Ram JCA**) The question of substituting compartment 549 for compartment 408 was and could not have been within the contemplation of the parties when they entered into the agreement. The problem with compartment 408 arose after the implementation of the agreement. That parties should stipulate for an unforeseen event in advance of it is *non sequitur*.

(2) (Per **Gopal Sri Ram JCA**) The plaintiff had produced sufficient evidence at the interlocutory stage to raise an inference that the second and third defendants were not exercising their independent judgment but were puppets controlled by the first defendant in all matters and affairs of the firm. The judge ought to have held that the plaintiff's contention that the second and third defendants were the alter ego of the first defendant merited further investigation at the trial and for that reason, amounted to a serious question to be tried.

(3) (Per **Gopal Sri Ram JCA**) The burden was on the second and third defendants to show that they took the interest without notice of the prior contract. This is a matter to be resolved at the trial and whether or not their assertion was the truth, is a matter to be determined after their evidence is tested by cross-examination. The summary disposal by the judge of an issue of such import was a serious miscarriage of justice.

(4) (Per **Gopal Sri Ram JCA**) The legality of the agreement was a serious question requiring mature consideration at the trial of the action and should not have been gone into in detail at the interlocutory stage. The question as to whether there was a serious issue to be tried depended on an objective perception of

A the facts presented to a judicial arbiter. No element of discretion is involved in the evaluation of those objective facts.

(5) (Per **Gopal Sri Ram JCA**) While the judge was correct in taking into account the practical realities of the situation, amongst which is the fact that workers would be laid off and the risk that B the concession would be lost through effluxion of time, he did not sufficiently balance these with other relevant and competing considerations that weighed heavily in favour of the injunction being continued until the trial of the action.

(6) (Per **Gopal Sri Ram JCA**) Although cl 14 of the agreement C provides that in the event of a termination of the agreement, the firm would pay to the plaintiff an agreed compensation amounting to twice the value of the timber sold, s 19 of the Specific Relief Act 1950 provides that a contract may be enforced even though a sum is named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the sum. Whether D the section applies to this case is a matter that is manifestly unsuitable for full discussion when considering the grant or refusal of an injunction.

(7) (Per **Siti Norma Yaakob JCA**) The life span of an ex parte interim injunction is two weeks from the date of the grant and E any application to have it revoked or set aside must be heard and determined by the court before the expiry of the two-week period. Here, the inter partes application to set aside the injunction was held and the judgment of the judge was made within the two-week period. As such, there was no basis for the appellant to reapply to the judge for the reinstatement of the interim injunction. F The plaintiff had adopted the correct procedure when he proceeded to appeal against the judge's order.

Per curiam:

(Per **Gopal Sri Ram JCA**) A judge hearing an application for an G interlocutory injunction should:

(1) ask himself whether the totality of the facts presented before him disclosed a bona fide serious issue to be tried. He must refrain from making any determination on the merits of the claim or any defence to it and identify with precision the issues raised and H decide whether they are serious enough to merit a trial. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious questions to be tried, he should move on to the next step of his inquiry;

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the I case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant, against the harm that would result from its refusal; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the status quo. It is a judicial discretion capable of correction on appeal. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

[Bahasa Malaysia summary

Kerajaan negeri Terengganu telah menawarkan kepada Kilang Perkayuan Hj Mohd Noor ('firma itu') lesen untuk memasuki dan menumbang kayu balak dari dua bidang konsesi yang dinyatakan sebagai bahagian 408 dan 412. Tawaran itu telah diterima. Sebelum lesen dikeluarkan, firma itu telah mengikat suatu perjanjian ('perjanjian itu') dengan plaintif di mana firma itu telah menjual kepada plaintif kesemua kayu balak yang terdapat di atas kedua-dua bidang tanah itu. Pihak berkuasa negeri kemudiannya telah mengeluarkan lesen untuk bahagian 412 yang tidak dipertikaikan. Apabila plaintif hendak mula menumbang kayu balak dari bahagian 408, beliau mendapati bahawa pembalak-pembalak dari tanah yang bersebelahan telah menumbang kayu balak daripada bahagian 408 dan tanah itu tidak lagi sejajar dengan terma atau gambaran yang diberi di dalam geran asal di dalam lesen itu. Telah dipersetujui bahawa firma itu akan memohon untuk sebidang tanah yang lain sebagai pengganti. Selepas permohonan itu dibuat, pihak negeri telah mengeluarkan lesen yang baru kepada firma itu untuk sebidang tanah yang baru yang dinyatakan sebagai bahagian 549.

Defendan pertama, tuan punya tunggal firma itu, kemudiannya telah menjadi bankrap dan defendan kedua dan ketiga telah dibawa masuk sebagai rakan kongsi, lalu defendan pertama telah menarik diri daripada firma itu. Apabila lesen baru untuk bahagian 549 dikeluarkan, firma itu telah bertindak seperti perjanjian itu tidak wujud. Plaintif kemudiannya telah mengeluarkan suatu writ terhadap defendan dan telah mendapat suatu injunksi ex parte untuk menghalang mereka daripada memasuki bahagian 549 atau melaksanakan sebarang perjanjian, melainkan perjanjian dengan plaintif untuk menjual kepadanya kayu balak yang telah ditumbang daripada tanah tersebut.

Atas suatu permohonan untuk mengetepikan injunksi itu, hakim telah membubarkan injunksi itu kerana:

(1) pihak-pihak kepada perjanjian itu tidak berfikir bahawa bahagian 549 akan menjadi sebahagian daripada perjanjian mereka dan, oleh itu, plaintif tidak boleh menuntut sebarang hak berkenaan dengannya;

(2) plaintif tidak mempunyai locus standi untuk mendakwa defendan kedua dan ketiga kerana mereka tidak menjadi pihak kepada perjanjian itu;

A (3) perjanjian itu menyalahi undang-undang dan oleh itu, tidak terdapat soalan serius yang perlu dibicarakan;

(4) imbangan kemudahan memihak kepada defendan; dan

(5) ganti rugi merupakan remedi yang sesuai kerana pihak-pihak telah memperuntukkannya di dalam fasal 14 perjanjian itu.

B Plaintif telah membuat rayuan ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan itu:

(1) (Oleh **Gopal Sri Ram HMR**) Soalan mengganti bahagian 549 untuk bahagian 408 tidak mungkin terfikir oleh pihak-pihak
C apabila mereka mengikat perjanjian itu. Masalah dengan bahagian 408 hanya timbul selepas perjanjian itu dilaksanakan. Adalah *non sequiter* bahawa pihak-pihak akan dapat membuat peruntukan untuk kejadian yang tidak diramalkan.

(2) (Oleh **Gopal Sri Ram HMR**) Plaintif telah membentangkan
D bukti yang mencukupi pada peringkat interlokutori untuk menimbulkan inferens bahawa defendan kedua dan ketiga tidak melaksanakan pertimbangan secara bebas tetapi merupakan patung di bawah kawalan defendan pertama di dalam semua hal firma itu. Hakim sepatutnya memutuskan bahawa hujah plaintif
E bahawa defendan kedua dan ketiga merupakan alter ego defendan pertama memerlukan siasatan lanjut pada perbicaraan dan oleh itu, merupakan suatu soalan serius yang perlu dibicarakan.

(3) (Oleh **Gopal Sri Ram HMR**) Beban terletak pada defendan kedua dan ketiga untuk menunjukkan bahawa mereka mengambil
F kepentingan itu tanpa mengetahui tentang kontrak yang terlebih dahulu. Ini merupakan suatu perkara yang perlu diselesaikan pada perbicaraan dan sama ada pengataan itu adalah benar atau tidak, merupakan suatu perkara yang perlu diputuskan selepas keterangan mereka disoal balas. Penyelesaian terus suatu isu yang amat penting oleh hakim itu merupakan suatu salah laksana
G keadilan.

(4) (Oleh **Gopal Sri Ram HMR**) Keesahan perjanjian itu merupakan suatu soalan serius yang memerlukan pertimbangan yang matang pada perbicaraan tindakan itu dan tidak sepatutnya dibincangkan dengan terperinci di peringkat interlokutori. Soalan sama ada
H terdapat suatu isu serius yang perlu dibicarakan bergantung kepada suatu penanggapan objektif fakta yang dibentangkan kepada seorang penimbang tara kehakiman. Unsur budi bicara tidak terlibat di dalam penilaian fakta objektif itu.

(5) (Oleh **Gopal Sri Ram HMR**) Walaupun hakim itu betul apabila
I mempertimbangkan hakikat praktik situasi itu, antaranya adalah fakta bahawa pekerja-pekerja akan diberhentikan kerja dan risiko bahawa konsesi itu akan hilang kerana luput masa, beliau tidak menimbangkan perkara ini secukupnya dengan pertimbangan lain yang relevan dan bersaing yang menunjukkan dengan jelas

bahawa injunksi itu patut dikekalkan sehingga perbicaraan tindakan itu. A

(6) (Oleh **Gopal Sri Ram HMR**) Walaupun fasal 14 perjanjian itu memperuntukkan bahawa sekiranya perjanjian itu ditamatkan, firma itu akan membayar kepada plantif suatu pampasan yang telah dipersetujui yang berjumlah sebanyak dua kali nilai kayu balak yang telah dijual, s 19 Akta Relif Spesifik 1950 memperuntukkan bahawa suatu kontrak boleh dikuatkuasakan walaupun suatu jumlah telah ditetapkan sebagai jumlah yang perlu dibayar sekira berlakunya kemungkiran kontrak, dan pihak yang bersalah sanggup membayar jumlah itu. Sama ada seksyen itu terpakai kepada kes ini adalah suatu perkara yang amat tidak sesuai untuk perbincangan penuh apabila mempertimbangkan pemberian atau penolakan suatu injunksi. B C

(7) (Oleh **Siti Norma Yaakob HMR**) Jangka hayat suatu injunksi interim ex parte adalah dua minggu daripada tarikh pemberiannya dan sebarang permohonan untuk membatalkan atau mengetepikannya mesti didengar dan diputuskan oleh mahkamah sebelum tamat tempoh dua minggu itu. Di dalam kes ini, permohonan antara pihak untuk mengetepikan injunksi itu telah diadakan dan penghakiman telah dibuat dalam tempoh dua minggu. Oleh itu, tidak terdapat alasan untuk perayu memohon semula kepada hakim itu bagi menghidupkan semula injunksi interim itu. Plaintif telah menggunakan prosedur yang betul apabila beliau membuat rayuan terhadap perintah hakim itu. D E

Per curiam:

(Oleh **Gopal Sri Ram HMR**) Apabila mendengar suatu permohonan untuk injunksi interlokutori, seseorang hakim mestilah: F

(1) menanya dirinya sendiri sama ada keseluruhan fakta yang telah dibentangkan di hadapannya mendedahkan isu bona fide yang serius yang perlu dibicarakan. Beliau mesti menahan diri supaya tidak membuat sebarang pemutusan atas merit tuntutan itu atau sebarang pembelaan terhadapnya dan mengenal pasti dengan tepat isu yang dibentangkan dan memutuskan sama ada isu itu cukup serius untuk mewajarkan suatu perbicaraan. Jika beliau memutuskan bahawa tidak terdapat soalan serius yang didedahkan, relief itu sepatutnya ditolak. Tetapi, jika beliau memutuskan bahawa terdapat soalan serius yang perlu dibicarakan, beliau sepatutnya mangambil langkah seterusnya dalam siasatan beliau; G H

(2) setelah mendapati bahawa suatu isu yang memerlukan siasatan lanjut didedahkan, beliau mesti mempertimbangkan di mana terletaknya keadilan kes itu. Beliau mesti mempertimbangkan perkara yang relevan, termasuk hakikat praktik kes di hadapan beliau dan menimbangkan kesusahan yang akan diakibatkan jika injunksi itu diberi, berbanding dengan kesusahan yang akan diakibatkan jika injunksi itu ditolak; dan I

A (3) pertimbangan penting yang harus diambil ingat oleh hakim adalah bahawa remedi yang beliau diminta melaksanakan adalah secara budi bicara, yang bertujuan menghasilkan keputusan yang adil untuk tempoh di antara tarikh permohonan itu dan perbicaraan sebenar dan untuk mengekalkan status quo. Ia merupakan budi bicara kehakiman yang boleh diperbetulkan atas rayuan. Seseorang hakim sepatutnya menghuraikan di dalam penghakimannya faktor-faktor yang penting di dalam pemikirannya itu apabila membuat keputusannya.]

[*Editorial Note*: The defendants have filed a notice for leave to appeal C to the Federal Court.]

Notes

For cases on applications to set aside interlocutory injunctions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1563, 1621–1627.

D For cases on the balance of convenience in granting injunctions, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1817–1818.

For a case on whether damages would be an adequate remedy in deciding whether or not to grant an injunction, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1819.

E

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316 (refd)

Bhup Narain Singh v Gokul Chand Mahton LR 61 IA 115 (refd)

Bina Satu Sdn Bhd v Tan Construction [1988] 1 MLJ 533 (folld)

F *Bissessar Das v Emmanuel Vas* LR 55 IA 58 (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (refd)

Corporation of the City of Toronto v Toronto Railway Co [1907] AC 315 (refd)

G *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 (refd)

Hashim bin Adam v Daya Utama Sdn Bhd [1980] 1 MLJ 125 (not folld)

Jones v Lipman [1962] 1 All ER 442; [1962] 1 WLR 832 (refd)

H *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 (not folld)

Mohamed Zainuddin bin Puteh v Yap Chee Seng [1978] 1 MLJ 40 (refd)

Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224 (refd)

Penang Han Chiang Associated Chinese School Association v National I *Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302 (not folld)

Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd [1985] I MLJ 132 (folld)

Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd [1977] 2 MLJ 161 (not folld)

Syarikat Seri Padu Sdn Bhd v Intan Enterprises Co [1982] 2 MLJ 17 (folld)
Tan Bing Hock v Abu Samah [1968] 1 MLJ 221 (not folld)
Tan Suan Choo v Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 (folld)
Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter [1992] 2 MLJ 689 (folld)
Vethanayagam v Karuppiah & Ors [1968] 1 MLJ 283 (HC); [1969] 1 MLJ 146 (FC) (not folld)
Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd (1978) 20 ALR 129 (refd)
Zaibun Sai bte Syed Ahmad v Loh Koon Moy & Anor [1982] 2 MLJ 92 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 44, 67(1)
Societies Act 1966 s 12(3)
Specific Relief Act 1950 ss 19, 20(1)(g), 26(b), 52, 53, 54(f), 55, Ch X Pt III
Rules of the High Court 1980 O 29 r 1(2B)

Cyrus Das (*Steven Thiru* with him) (*Anthony, Pereira & Ten*) for the appellant.
Mokhtar bin Ngah (*Mokhtar Ngah & Co*) for the first respondent.
Chan Kok Keong (*Chew Kok Lian* with him) (*Teo & Chew*) for the second and third respondents.

Gopal Sri Ram JCA: This is an appeal against the decision of the High Court setting aside an injunction obtained ex parte by the appellant (the plaintiff in the court below) against the respondents (the defendants in the court below). For convenience, the parties will, throughout this judgment, be referred to as the plaintiff and the defendants. The injunction obtained by the plaintiff enjoined the defendants and their agents from, inter alia, entering the parcel of a timber concession known as Block 549 or from giving any effect to any agreement, apart from the agreement with the plaintiff to sell him the timber logs harvested from the said parcel. On 28 November 1994, the plaintiff moved this court on an urgent basis for an interim injunction in terms of the order that was discharged to secure the status quo pending the disposal of the appeal. After having heard argument, we allowed the plaintiff's application, exercising the powers conferred on us by s 44 of the Courts of Judicature Act 1964. In view of the urgency of the matter, there being an imposition of a temporary restraint upon the defendants and the interest of the state government as issuing authority being indirectly involved, we directed that the appeal proper be heard on 12 December 1994. Accordingly, the appeal came up before us on that date. After hearing submissions of counsel, we allowed the appeal, indicating that we would give our reasons for the decision we handed down and this we now do.

A The brief facts relevant to this appeal are these. On 9 October 1990, the state government of Terengganu wrote a letter to Kilang Perkayuan Hj Mohd Noor ('the firm'). In it they offered to the firm a licence to enter upon and harvest timber from two parcels of a concession measuring an area of about 1,000 acres and demarcated as compartments 408 and 412, B respectively. The offer was accepted. As at the date of that letter, the first defendant was the sole proprietor of the firm. On 13 January 1991, before any licence was issued, the firm (in effect the first defendant) entered into a written agreement ('the agreement') with the plaintiff under the terms of which it sold to the plaintiff all the timber located on the two parcels. By a letter dated 28 January 1991, the state authority wrote to the firm calling C for the payment of the premium and other dues. The sums called for having been settled, the state authority issued the licence, firstly, in respect of compartment 412 in respect of which no dispute arises. Large sums of money were paid by the plaintiff to the first defendant, some of which were, according to the plaintiff's affidavit evidence, in advance of the due D dates for payment, including the premiums due to the state in respect of both parcels. In response to a question by the court, Encik Das, who appeared for the plaintiff before us (but who was not counsel in the court below) said that the plaintiff had paid the firm RM870,000. The plaintiff began to harvest timber from compartment 412 using the services of a Mr Ng Kim Vooy of Zaman Enterprise and as we have said, without there E being any dispute. Whose agent Mr Ng was in the whole transaction is the subject of some controversy. When the plaintiff came to harvest timber from compartment 408, he discovered that that parcel had been subjected to logging by neighbouring loggers. The compartment had been left in a state in which it did not accord with the terms or the description accorded it in the original grant in the licence. It is the plaintiff's case that, at this F stage, an arrangement was arrived at whereby the firm was to apply for a parcel to replace compartment 408. This was done and the state issued a new licence to the firm in respect of a new parcel designated as compartment 549 which is the subject of the present litigation. In its letter dated 18 October 1993, approving the replacement, the state made it clear that G all moneys paid to it under the previous grant would be taken into account in reckoning the premium for the new parcel. Because of the emphasis placed by counsel on the contents of that letter, we reproduce it below.

> Jabatan Perhutanan Negeri, Terengganu
>
> Ruj kami: (56)dlmPHNT400/7/1/419
> H Tarikh: 18 Oktober 1993
>
> Pengurus
> Kilang Perkayuan Haji Mohd Noor
> No 500, Jalan Butut
> 21700 Kuala Berang
>
> I Tuan
>
> Permohonan mengganti sebahagian kawasan perjanjian dalam sub-blok 2 di kawasan sempadan Terengganu/Kelantan oleh Kilang Perkayuan Haji Mohd Noor

Dengan segala hormatnya merujuk kepada perkara di atas, sukacita dimaklumkan bahawa kerajaan negeri telah bersetuju meluluskan sebagai kawasan ganti sub-blok 2 seluas 197.10 hektar sahaja dalam sebahagian kompatmen 549, Hutan Simpan Tembat seperti bertanda merah pada pelan yang disertakan bersama. Oleh yang demikian, kelulusan kawasan membalak dalam sub-blok 2 bagi blok 3 seluas 197.10 hektar seperti surat pejabat ini Bil (2) dalam siri yang sama bertarikh 28 Januari 1991 adalah dibatalkan.

2 Sementara itu, kerajaan negeri juga bersetuju meluluskan tempoh perjanjian dilanjutkan selama satu tahun lagi mulai 12 Januari 1993 kepada 11 Januari 1994 bagi membolehkan kawasan ganti tersebut diusahasilkan. Lain-lain syarat kelulusan adalah seperti surat pejabat ini Bil (175)dlmPHNT547(S) bertarikh 9 Oktober 1990.

3 Oleh kerana pihak tuan telah menjelaskan bayaran tersebut seperti rujukan surat Bil (2)dlmPHDTB4/7/1/118 bertarikh 4 Mac 1992 bagi sub-blok 2 yang telah dibatalkan tersebut maka pejabat ini tiada halangan segala bayaran yang telah dibuat dipindahkan untuk kawasan yang diluluskan ganti tersebut. Untuk proses pelesenan selanjutnya, pihak tuan diminta berhubung dengan Pegawai Hutan Daerah, Terengganu Barat, Kuala Berang.

Sekian dimaklumkan, terima kasih.

'Berkhidmat untuk negara'

Saya yang menurut perintah,
— Sgd —
(Mohd Yusoff bin Baharom)
bp Pengarah Perhutanan Negeri, Terengganu

Three events of some importance require mention. The first is the bankruptcy of the first defendant that occurred on 21 January 1993. The receiving and adjudication orders made against the first defendant were, however, set aside on 10 July 1994. The second event is the entry of the second and third defendants into the firm as partners on 19 October 1993. They are the wife and son, respectively, of the first defendant. The third is the withdrawal of the first defendant from the firm on the same date, ie 19 October 1993. Once the new licence in respect of compartment 549 had been issued, the firm proceeded to act as if the agreement did not exist. In fact, the first defendant went so far as to suggest in a letter dated 15 July 1994 written by him to the plaintiff's brother (who, on the affidavit evidence on record, acted as the plaintiff's agent) that the entire transaction was a loan. The plaintiff then took out a writ against the defendants and obtained the injunction adverted to earlier in this judgment. An application to set aside that injunction was acceded to by the learned judge and it is against that order that the present appeal has been brought.

In the judgment appealed against, the learned judge has advanced five grounds for dissolving the injunction. First, he found that it was not within the contemplation of the parties that compartment 549 should form part of the transaction between the parties as recorded in the agreement and for that reason, the plaintiff could claim no rights in respect of it. Secondly, he found that the plaintiff had no locus standi to sue the second and third defendants because they were not parties to the agreement.

Thirdly, he held that the agreement was illegal and that consequently, there was no serious question to be tried. The fourth ground advanced by the learned judge is that the balance of convenience lay in favour of the defendants. Lastly, the learned judge held that damages are an adequate remedy, the parties having provided for it in cl 14 of the agreement.

We propose to deal with each of the reasons which the learned judge had advanced for setting aside the injunction but before we do so, we consider it desirable, in view of the approach taken by the learned judge, to review some of the authorities on the subject and to restate the relevant principles that apply to a case such as the present.

We begin by respectfully accepting that the correct approach to be adopted and the stages of reasoning involved in the process of arriving at the conclusion as to whether interlocutory injunctive relief should be granted or withheld are those that have been neatly summarized by Hashim Yeop A Sani J in *Mohamed Zainuddin bin Puteh v Yap Chee Seng* [1978] 1 MLJ 40. This is what that very eminent judge said in that case (at p 42):

> Firstly to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the court to take into account any tipping in the balance as revealed by affidavits.
>
> ... Secondly, if the plaintiffs were to succeed at the trial, whether they would be adequately compensated for the interim continuance of the defendant's activities. Conversely is the question that if the defendants were to succeed at the trial, whether they would be adequately compensated for the interim restriction on their activities which the grant of an interlocutory injunction would have imposed. The judge then considers the balance of convenience, and if the relevant factors were evenly balanced the court should grant an interlocutory injunction which would maintain the status quo. *It is said that at that stage the court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits.* (Emphasis added.)

In *Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd* [1985] 1 MLJ 132, the plaintiff and defendant entered into an agreement under which the plaintiff was to manage the defendant's hotel for a period of ten years. Disputes having arisen, the plaintiff obtained an ex parte interim injunction restraining the defendant from interfering with the plaintiff's running of the defendant's hotel. An application to set aside that injunction having been refused, the defendant appealed to the Federal Court. On appeal it was argued that the agreement in question being for a period longer than three years, it could not be specifically enforced. Reliance was placed on s 20(1)(g) of the Specific Relief Act 1950 which provides as follows:

> The following contracts cannot be specifically enforced:
>
> ...
>
> (g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;

Counsel for the defendant then submitted that by reason of s 54(f) of the Specific Relief Act 1950, no injunction (meaning a permanent injunction) could be granted to prevent the breach of a contract not specifically enforceable. It was then argued, relying on the decision in *Vethanayagam v Karuppiah & Ors* [1968] 1 MLJ 283, that an interim injunction cannot be granted if a permanent injunction did not lie.

These arguments, which appeared to provide a complete answer to the plaintiff's claim on merits, were rejected by the Federal Court.

Abdul Hamid CJ (Malaya), delivering the judgment of the court said ([1985] 1 MLJ 132 at p 135):

> While we appreciate that these questions are crucial indeed they are the main grounds upon which the appellant's case rests, we do not, however, see the necessity at that stage for the learned judge to decide on these difficult points of law.
>
> Suffice for the learned judge to decide, and this he did, that there are serious questions that have arisen for trial. While we agree that there are serious questions of law we are also of the view that these questions are relevant for consideration in determining the grant or otherwise of an interim injunction but the question is should it be the court's business to resolve these serious and difficult questions of law at that stage of the litigation? We think not.

In *Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd* (1978) 20 ALR 129, after referring (at p 145) to *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316, the locus classicus on the subject, Brennan J (sitting in the General Division of the Federal Court of Australia), laid down the following test (at p 146) with which, subject to the qualification we shall express in a moment, we respectfully agree:

> The strength of the evidentiary aspect of the case is determined in the light of the opportunity to secure and to present in the proceedings before the primary judge evidence to support the prima facie case: *De Mestre v AD Hunter Pty Ltd* (1952) 77 W N (NSW) 143 at p 145. Though the applicant's evidence be sketchy and likely to be insufficient if standing alone to establish the applicant's case at the final hearing, yet the circumstances in which the application is heard may show that the evidentiary strength of the applicant's case is substantial and that his case has a fair chance of success. *If the applicant's entitlement to relief depends upon his making good a proposition of law the judge does not decide whether the proposition be right or wrong, but only whether the proposition is sufficiently arguable to show that the applicant has a fair chance of success at the hearing.* (Emphasis added.)

The qualification that we make in accepting the principle contained in the passage cited is in respect of the reference therein to the requirement that an applicant for interlocutory injunctive relief has to establish a prima facie case, an approach which our courts have abandoned after *American Cyanamid.*

Our attention has been drawn to the more recent decision of the Supreme Court in *Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter*

A [1992] 2 MLJ 689. Jemuri Serjan CJ (Borneo), there observed that a judge hearing an application for an interim injunction should not, in his judgment, give the impression that he had in fact disposed of the main action on its merits. Although his Lordship's remarks in that case were made in the context of a proceeding commenced by an originating summons, they are of universal application.

B

There remains one matter of importance that we need to address. It has to do with the correctness of the proposition of law established by *Vethanayagam v Karuppiah & Ors* [1968] 1 MLJ 283 which is in conflict with authorities decided after it. To recapitulate, that case is authority for the proposition that an applicant will not be entitled to an interlocutory C injunction in circumstances where a final injunction cannot be granted.

Now, *Vethanayagam* was a case in which the plaintiff, a member of a registered society, brought an action challenging the election of the defendants as office bearers to a branch of the society. The society had failed to apply timeously to the Registrar of Societies for the approval of D the branch. The result was that under s 12(3) of the Societies Act 1966, the branch was illegal. The plaintiff then moved for an interlocutory injunction to restraint the defendants form acting contrary to the constitution of the society. The illegality point was raised by the plaintiff himself at the hearing of his application. In refusing interlocutory relief, Raja Azlan Shah J said [at p 284]:

E

> To my mind, this motion can be determined on the narrow ground whether it is just and proper to grant a temporary injunction at the suit of a member of an unlawful society to restrain other members of that society from doing acts contrary to the rules of the constitution of the Congress.
>
> Jurisdiction to grant a temporary injunction is always a matter of F discretion which is to be exercised in accordance with well-known principles. An order for a temporary injunction can be sought only in aid of a prospective order for a perpetual injunction. If, therefore, in the event of the plaintiff's success, he cannot obtain a decree for perpetual injunction, it is not competent for him to ask for a temporary injunction (see *Bishun Prashad v Sashi Bhusan* AIR 1923 Pat 133). *In other words, a temporary injunction will not be* G *granted in cases where a permanent injunction is not available under ss 52 to 54 of the Specific Relief (Malay States) Ordinance 1950.* Section 54(f) enacts that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced under the provisions of Ch II of the Ordinance, for example s 20(b). The grant of injunction therefore is always guided by the same principles as the grant of specific H performance of a contract, and if the contract is such as not to be capable of being specifically enforced, no injunction can be granted to prevent its breach. (Emphasis added.)

The plaintiff appealed. The Federal Court (whose judgment was delivered by Suffian FJ) dismissed the appeal but for different reasons: reasons not I relevant for present purposes. Their judgment is to be found in [1969] 1 MLJ 146. Since the route their Lordships took to arrive at their conclusion did not necessitate any discussion as to the correctness of the reasoning applied by the judge at first instance, their affirmation of his ultimate

decision cannot in our view be regarded as an acceptance of the principles applied by him. But we must say at once, in all fairness to that very learned judge, that the Federal Court neither made any adverse comment on the approach adopted by him nor of the principles that he applied in coming to his decision. Indeed we would go so far as to say that the Federal Court itself followed closely the jurisprudence applied by Raja Azlan Shah J for refusing interlocutory relief.

The correctness of the decision in *Vethanayagam* [1968] 1 MLJ 283 depends, in our judgment, upon the answer to one crucial question. It is this. Do the provisions of Ch X of Pt III of the Specific Relief Act 1950 (within which fall ss 52 to 55) apply to both interlocutory and perpetual injunctions? In *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323, Edgar Joseph Jr J answered that question in the negative. His Lordship in that case held that the statutory bar encapsulated in s 54(d) of the Act is confined to perpetual or final injunctions and has no application to temporary injunctions which are governed by s 51 of the Act. He came to that conclusion by reference to the headings appearing in Pt III of the Act. The judicial reasoning in *Tan Suan Choo* is faultless and the interpretative process applied there has the support of respectable and high authority. Headings, unlike marginal notes, are permissible guides to the interpretation of statutes: *Corporation of the City of Toronto v Toronto Railway Co* [1907] AC 315. The decision in *Tan Suan Choo* was followed by VC George J in *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533. Although *Tan Su Choo* and *Bina Satu* appear to be in conflict with the decision of the Supreme Court in *Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302, the approach adopted in both the former and the authorities supporting that approach were never considered by the Supreme Court in *Penang Han Chiang*. As such, we are not persuaded that the latter overruled both the former *sub silentio*, more so when neither were referred to in the judgment of the Supreme Court. We are of the view that the decision in *Penang Han Chiang* may well have been different if the attention of the Supreme Court had been drawn to the judgments in *Tan Suan Choo* and *Bina Satu*.

In our considered opinion, both *Tan Suan Choo* and *Bina Satu* correctly state the law. It therefore follows that *Vethanayagam*, in so far as it conflicts with these two authorities is bad law and should no longer be followed. We are fortified in the view that we have taken by the fact that the Federal Court in *Si Rusa* [1985] I MLJ 132 declined to follow and apply *Vethanayagam* and by the approach laid down in *Tien Ik* [1992] 2 MLJ 689.

To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:

(1) he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It

is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgement the several factors that weighed in his mind when arriving at his conclusion.

It is with these matters in mind that we now return to the case at hand and examine the reasons given by the learned judge for setting aside the injunction.

It is convenient to deal with the first and second grounds together. This is what the learned judge said in relation to these.

> It may be noted that there is no saving provision in the agreement permitting the plaintiff to log in forest compartment 549. To put simply, it was not within contemplation of the parties that compartment 549 was to form part of the agreement. So, even if the first defendant was a partner of Syarikat, the agreement does not afford a ground for the plaintiff to log in forest compartment 549.
>
> In the case of the second and third defendants, the plaintiff has no locus standi to bring this suit against them as they are not parties to the agreement (*Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12).

In our judgment, these passages overlook certain vital aspects of the case. In the first place, the question of substituting compartment 549 for 408 was not and could not have been within the contemplation of the parties when they entered into the agreement. At that point in time, the contracting parties must have proceeded on the basis that compartment 408 was available in its original state to be harvested. The problem about compartment 408 arose much after the agreement had proceeded to implementation. That parties should stipulate for an unforeseen event in advance of it is *non sequitur*.

The finding by the learned judge that the plaintiff can claim no relief against the second and third defendants completely overlooks the plaintiff's case on this point, namely, that these defendants are truly the alter ego of the first defendant. The plaintiff had produced sufficient evidence at the interlocutory stage to raise an inference that the second and third defendants were not exercising their independent judgment but were merely puppets controlled by the first defendant in all matters concerning the business and affairs of the firm. That is all that was required of the plaintiff at this interlocutory level. Any findings made by the judge on this aspect of the case would not have been final. It would have been a preliminary view which is subject to change at the trial after he has heard all the evidence, including any evidence given by the defendants, displacing the prima facie view formed at the interlocutory stage. On the evidence before him, the learned judge should have held that the allegations were not baseless and constituted a serious question to be tried. Indeed, we are satisfied that the learned judge erred in failing to give any consideration at all to this aspect of the case. To ignore a serious submission based on evidence that is not inherently incredible or inherently improbable is a serious misdirection. In our judgment, the learned judge ought to have held that the plaintiff's contention that the second and third defendants were the alter ego of the first defendant merited further investigation at the trial and for that reason, amounted to a serious question to be tried. He misdirected himself in dismissing out of hand a case mounted on prima facie evidence that supported this aspect of the plaintiff's case.

The conclusion of the learned judge that the agreement was not enforceable against the second and third defendants because they were not parties to it completely ignores the provisions of s 26(b) of the Specific

A Relief Act 1950 which was brought to his attention during argument. That section provides that:

> Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against —
>
> (a) ...
>
> B (b) any other person claiming under a party to the contract by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

The effect of that section is that the burden lies on him (in this case the second and third defendants) who asserts that he took the interest without C notice of the prior contract. (See *Bhup Narain Singh v Gokul Chand Mahton* LR 61 IA 115 and *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224.) There was no duty on the learned judge to make a positive finding that the second and third defendants had or had not discharged that burden. Indeed he was prohibited from expressing any concluded view on the matter. But he should have held that this was a D matter to be resolved at the trial instead of brushing it aside. The learned judge should have properly addressed his mind to the attempt by the defendants to escape liability by claiming that they were not parties to the agreement and for that reason alone they were not bound by it. Their assertion, in the light of the compelling prima facie evidence that was laid E before the court sounds as hollow as the not dissimilar response given by the unsuccessful defendant in *Jones v Lipman* [1962] 1 All ER 442; [1962] 1 WLR 832. We are not for one moment suggesting at this stage that the second and third defendants were not independent agents, exercising their own judgment free from any control by the first defendant. That they may well be. However, whether their assertion on the point or that made by the F plaintiff is the truth, is a matter that has to be determined after their evidence has been tested by cross-examination. The summary disposal by the judge of an issue of such importance is, in our view, a serious miscarriage of justice.

We now turn to the third reason given by the learned judge. The G learned judge's finding that the agreement was illegal and that there was therefore no serious question to be tried is clearly contrary to the pronouncements in *Mohamed Zainuddin* [1978] 1 MLJ 40 and *Si Rusa* [1985] I MLJ 132, the latter being an authority plainly binding on him. The entry by the learned judge upon a question that was exclusively within the province of the trial judge was clearly wrong. Further, the inquiry as to H whether there was a serious question to be tried is one that ought to have been addressed at the outset and not by the way as a secondary issue. It appears that the correct approach as laid down by several leading authorities was not followed in this case.

The learned judge, in concluding that the agreement was illegal, I relied on *Tan Bing Hock v Abu Samah* [1968] 1 MLJ 221. However, Encik Das submitted that his case did not come within the category of cases of which *Tan Bing Hock* is one. Others in that category include *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161, *Sundang*

Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd [1977] 2 MLJ 161 and *Hashim bin Adam v Daya Utama Sdn Bhd* [1980] 1 MLJ 125. He drew our attention to the decision of a strongly constituted Federal Court in *Syarikat Seri Padu Sdn Bhd v Intan Enterprises Co* [1982] 2 MLJ 17 which he submits is much akin to the facts of his case. Counsel also submitted that the learned judge misapprehended the true nature of the agreement by treating it as an assignment of rights when it was, according to its language, nothing more than a sale of the timber standing on the land in question. Counsel then argued that this was an issue on which detailed argument and mature consideration was necessary. In response, Encik Chan Kok Keong who appeared for the second and third defendants before us, but not in the court below, and to whom Encik Mokhtar deferred, submitted that whether there was a serious question to be tried was a matter within the discretion of the learned judge and ought, therefore, not to be readily interfered with on appeal.

We are of the view that Encik Das is right in the submissions that he made. For our part, we hold that the legality of the agreement and the other issues which we have adverted to earlier in this judgment, are all serious questions requiring mature consideration at the trial of the action and should not have been gone into in detail at the interlocutory stage as was done by the learned judge. The answer to Encik Chan's submission is contained in the proposition that was put to him in the course of his address to us. It is this. The question as to whether there is disclosed a serious issue to be tried depends, not as he contended, upon the discretion of the judge, but upon an objective perception of the facts presented to a judicial arbiter. In our judgment, no element of discretion is involved in the evaluation of those objective facts. Accordingly, we have no hesitation in dissenting from the submission made by Encik Chan. In our view, the learned judge clearly went beyond the parameters fixed by binding precedent.

The fourth and fifth reasons may be taken together. And this is how the learned judge put them.

> As argued by Encik Teo Poh Oon, if injunction is not lifted, no logging activity could be carried out in compartment 549 and the sawmill of Syarikat (sic) becomes inoperational. Workers had to be laid off. Further, licence for to log in compartment 549 would expire by efflux (sic) of time. As such, I hold, the balance of convenience favours the defendants.
>
> Under cl 14 of the agreement, the parties had contemplated payment of appropriate damages in the event of breach by the first defendant. On the facts I hold that damages would be an adequate remedy.

It is apparent from these passages that the learned judge proceeded upon the erroneous assumption that the adequacy of damages in lieu of an injunction is a matter to be treated separately from the balance of convenience. All matters that guide a court of equity in determining where the justice of the case lies are compendiously called 'the balance of convenience' and we have, earlier in this judgment, made reference to some of those matters.

While we agree that the learned judge was correct in taking into account the practical realities of the situation, among which is the fact that workers would be laid off and the risk that the concession would be lost through effluxion of time, we are of the view that he did not sufficiently balance these with other relevant and competing considerations that weighed heavily in favour of the injunction being continued until the trial of the action. There was no evidence before the learned judge of the difficulties adverted to by him in relation to the workers in the sawmill. In any event, this difficulty was caused not by anything that the plaintiff did, but by the defendants throwing overboard the obligations they were bound to honour. We also note that there was no suggestion that there was an irrevocable arrangement ab initio that the firm's sawmill was to exclusively mill only the logs harvested from the concession in question. The consideration that the licence may lapse by effluxion of time is sufficiently met by an order for early trial, and, depending on the urgency of the matter, a very early date for the disposal of the suit could have been be fixed by the learned judge.

We next turn to cl 14 of the agreement on which the judge relied. All that clause says is that in the event of a termination of the agreement by the firm, it shall pay to the plaintiff agreed compensation amounting to twice the value of the timber sold. The clause also reserves to the plaintiff the right to take any action he deems fit. Quite apart from the proper construction that is to be placed on the clause, which is not a matter to be dealt with on a summons to dissolve an injunction, s 19 of the Specific Relief Act 1950 (which has been completely overlooked by the judge) provides the necessary prima facie answer. That section is in the following terms:

> A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

The section has been considered in a number of cases, including *Bissessar Das v Emmanuel Vas* LR 55 IA 58 and *Zaibun Sai bte Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92, both decisions of the Privy Council.

Whether the section applies to the circumstances of this case is a matter that requires full argument and mature consideration. It is an issue that is manifestly unsuitable for full discussion when considering the grant or refusal of an injunction and for that reason, we refrain from saying anything further upon it at this stage. What we do observe is that, by failing to consider the provisions of s 19 and its possible application to the facts before him, the learned judge in this case certainly failed to take into account an important consideration, and by placing reliance wholly on cl 14 of the agreement in order to exercise his discretion, took into account an irrelevant consideration.

We have been reminded by counsel on both sides that we are here addressing our minds to an appeal directed against the exercise of discretion by a judge. As an appellate court, we have no initial discretion of our own to exercise. Our initial function is one of review only. But once it is demonstrated to a conviction, as has been done in this case, that the

exercise of discretion by the judge is plainly wrong in principle, that irrelevant considerations have been taken into account and that relevant considerations have been overlooked, we are seized of an independent discretion that falls to be exercised.

Having given the matter our utmost consideration, we formed the view that for the reasons given in this judgment, the decision of the learned judge should not be permitted to stand. Accordingly, we allowed the appeal and restored, until the trial of the action, the injunction granted by the High Court on 11 August 1994 upon the undertaking as to damages incorporated in that order. The respondents were ordered to pay the costs of this appeal and the costs of the proceedings in the court below to the appellant in any event. In the light of being advised by counsel that the licence is to expire in July 1995, we also ordered that the action be tried by the High Court in January 1995. It was also ordered that the deposit paid by the appellant was to be refunded to him.

Siti Norma Yaakob JCA: I have had the opportunity of reading the draft judgment of my brother judge, Gopal Sri Ram JCA, and I concur with all the reasons stated in the judgment in arriving at our decision on 12 December 1994.

However, there was one objection raised by Encik Chan Kok Keong, counsel for the second and third respondents, which I consider needs to be replied to, namely, his contention that the procedure adopted by the appellant through this appeal to have the interim injunction which he, the appellant, had obtained ex parte on 11 August 1994, reinstated is wrong in law as by virtue of O 29 r 1(2B) of the Rules of the High Court 1980, that interim injunction has since lapsed. Encik Chan contended further that the appellant should reapply for the interim injunction and not proceed to appeal against the learned judge's order dated 23 August 1994, when the interim injunction obtained ex parte was set aside following an application by the respondents to that effect.

Order 29 r 1(2B) states as follows:

> Unless sooner revoked or set aside, an interim injunction obtained in an ex parte application shall automatically lapse at the end of two weeks from the date on which it is granted.

It would appear that in practice, the life span of an interim injunction obtained ex parte is only for two weeks from the date of the grant and that any application by a dissatisfied party to have it revoked or set aside must be heard and determined by the court before the expiry of the two-week period.

In this appeal, the ex parte interim injunction was applied for and obtained by the appellant on 11 August 1994. The inter partes application to have it set aside was heard by the learned judge on 22 and 23 August 1994, and on 23 August 1994 itself, the learned judge dissolved the interim injunction. Thus, the hearings of the inter partes application were

held and the judgment of the learned judge was made within the two-week period stipulated by O 29 r 1(2B).

The hearings on 22 and 23 August 1994, although interlocutory in nature, were hearings inter partes on the merits of the application as to whether the interim injunction should continue to be maintained until the hearing of the main action itself or whether it should be dissolved at the instance of the respondents. As such, there is no basis for the appellant to reapply to the learned judge for the reinstatement of the interim injunction. This is more so, as the interim injunction obtained ex parte on 11 August 1994, did not automatically lapse at the end of the two-week period but was dissolved by an order of court made within two weeks of its grant. Moreover, that order of court is an appealable order and this court is empowered with the necessary jurisdiction under s 67(1) of the Courts of Judicature Act 1964, to deal with it.

Mr Chan's contention would have carried some weight if the respondents had not applied to have the interim injunction set aside within the two-week period. What then happens at the end of the two weeks? It would appear that under O 29 r 1(2B), the interim injunction automatically lapses and since the order makes no provision for renewal, there is a need for the appellant to reapply for the interim injunction. This situation did not arise in the appeal before us.

VC George JCA: I have the opportunity of reading the draft judgments of my brother Gopal Sri Ram JCA and sister Siti Norma Yaakob JCA in this matter which are in accord with my own reasons for the decision herein.

Appeal allowed.

Reported by Jeanne Tan